No. 17-43

In the Supreme Court of the United States

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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A simple syllogism disposes of this case. Title III requires a court to suppress evidence obtained from a wiretap order, even if the communications at issue were lawfully intercepted, if the order was "insufficient on its face." The wiretap orders obtained by the government in this case were facially insufficient because they concededly violated the requirement that the issuing judge authorize the interception of communications only within the court's territorial jurisdiction. Under the plain terms of the statute, suppression was therefore "automatic"; "[t]here is no room for judicial discretion." *United States* v. *Glover*, 736 F.3d 509, 513, 516 (D.C. Cir. 2013).

In its brief, the government has remarkably little to say about the actual text of Title III, which mandates suppression without exception. And it has little more to say in response to the legislative history cited by petitioners and their amici, which confirms Congress's desire to "prohibit * * * all interceptions of oral and wire communications, except those specifically provided for in the Act." *United States* v. *Giordano*, 416 U.S. 505, 514 (1974).

Instead, the government engages in a scattershot effort to make this case about anything other than the question presented and the language and history of Title III. For starters, the government asserts that the wiretap orders here were not facially insufficient but instead merely overbroad. But no court has accepted that implausibly narrow definition of "insufficient"; indeed, the government did not raise that argument below and, as far as we are aware, has never advanced it in any other case. That is for good reason: an order that on its face concededly violates Title III cannot possibly be "sufficient." In the remainder of its brief, the government presses other arguments that were not raised below, draws analogies to inapplicable Fourth Amendment doctrines, and incorrectly attempts to recast its own overreach as a court's good-faith mistake.

When the government actually joins issue on the question presented, its arguments are painfully thin. The government seeks to engraft an atextual and amorphous "fundamental defect" requirement on Title III's exception-free suppression remedy. Even under that requirement, petitioners would still prevail, because the territorial-jurisdiction limitation that was concededly violated here is not merely a "technical" requirement. Instead, it furthers Title III's overarching goal of protecting privacy by ensuring that judges exercise their responsibility

closely to supervise electronic surveillance conducted in their respective jurisdictions.

The government protests the "harsh medicine" of suppression. Br. 37. But that medicine was prescribed by Congress. Strict compliance with the requirements of Title III is a statutory command, not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Riley* v. *California*, 134 S. Ct. 2473, 2493 (2014) (citation omitted).

Make no mistake about what is really going on here: the government, not content with the delicate balance struck by Title III, is asking this Court to rewrite the statute by effectively nullifying either the territorial-jurisdiction limitation in Section 2518(3) or the facial-insufficiency ground for suppression in Section 2518(10)(a)(ii). But that is obviously a task not for the Court, but for Congress. The plain text of Title III mandates suppression where, as here, the underlying wiretap orders were facially insufficient because they exceeded the issuing court's jurisdiction. The judgments of the court of appeals should therefore be reversed.

A. The Wiretap Orders At Issue Were Facially Insufficient

Each of the wiretap orders at issue here was "insufficient on its face," 18 U.S.C. 2518(10)(a)(ii), because each order purported to authorize the interception of communications that the issuing judge lacked the power to authorize. The government now concedes that the orders authorized interceptions that would not comply with Title III. See Br. 7. But it contends that the issuing judge's error rendered the orders "overbroad" rather than facially insufficient. See Br. 16. In the government's view, because the error could supposedly have been rectified by

omitting the language impermissibly authorizing extra-territorial interception, the orders were not "lacking" or "missing" anything and thus were not insufficient. See Br. 16-19.

1. As an initial matter, the government did not raise that argument in the district court or in the court of appeals; it argued only that the orders did not violate Title III at all (an argument it has now abandoned). See, *e.g.*, 15-3236 Gov't C.A. Br. 24-33; 15-3237 Gov't C.A. Br. 24-34. This Court does not ordinarily consider an argument that was neither pressed nor passed upon below. See, *e.g.*, *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995). Indeed, petitioners have been unable to locate any other case in which the government has advanced its "overbreadth" argument; the government appears to have devised it only after this case reached the Solicitor General's Office. The Court granted review on the premise that the orders at issue were facially insufficient, see Pet. i (question presented), and it should decline to address the government's argument on the familiar ground that it is a "court of review, not of first view." *Chaidez* v. *United States*, 568 U.S. 342, 358 n.16 (2013) (citation omitted).

2. In any event, the government's newfangled argument lacks merit. The phrase "insufficient on its face" implies a comparison between the four corners of the order itself and the requirements of Title III; if the failure to comply with those requirements is evident from the text of the order, it is facially insufficient. See, *e.g.*, *Giordano*, 416 U.S. at 525 n.14; *United States* v. *Chavez*, 416 U.S. 562, 573-574 (1974); *United States* v. *Scurry*, 821 F.3d 1, 8 (D.C. Cir. 2016). The government does not dispute, and in fact concedes, that the orders did not comply with the territorial-jurisdiction requirement of Title III. See Br. 7.

For that reason, the orders at issue here were "defect[ive]" or "deficient," U.S. Br. 19, and therefore "insufficient on [their] face." Consistent with the foregoing understanding, lower courts have routinely asked whether an order was "invalid" or "defective" when faced with a challenge to the order's facial sufficiency. See, *e.g.*, *United States* v. *Traitz*, 871 F.2d 368, 378-379 (3d Cir.), cert. denied, 493 U.S. 821 (1989); *United States* v. *Moore*, 41 F.3d 370, 375-376 (8th Cir. 1994), cert. denied, 514 U.S. 1121 (1995); see also 15-3236 Gov't C.A. Br. 24, 30 (referring to whether the orders were facially "invalid").

The government suggests that an order is facially insufficient only if it is "lacking" or "missing" a provision that it is affirmatively required to contain, and not if it includes an invalid provision that contradicts a requirement of Title III. See Br. 17. But that cannot possibly be correct, because it would lead to bizarre results. On the government's view, an order that affirmatively authorized interception for 180 days rather than 30 (in violation of Section 2518(5)) would not be facially insufficient (because it would merely be "overbroad"), but an order that omitted a durational provision altogether would be insufficient. See Br. 24. That makes no sense; both orders are equally invalid, and thus insufficient, on their face.

3. The government further contends that the orders at issue here are not insufficient because Title III does not require wiretap orders to contain a jurisdictional provision; according to the government, the only provisions a wiretap order must contain are set out in a single subsection of Title III, Section 2518(4). See Br. 17. But while Section 2518(4) certainly identifies *some* information that a wiretap order must contain, nothing in that subsection suggests that it provides an exhaustive list. Cf. 18 U.S.C. 2518(5) (setting out additional provisions that must be included).

The plain language of Section 2518(3) makes clear that a wiretap order must contain a jurisdictional limitation. Section 2518(3) is the provision of Title III that empowers a judge to enter a wiretap order in the first place; it permits an order "authorizing * * * interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting" (except where the judge further "authorize[s]" the use of a mobile interception device). 18 U.S.C. 2518(3). The territorial-jurisdiction limitation does not appear in the separate provisions governing how an interception is to be conducted, see, *e.g.*, 18 U.S.C. 2518(8); instead, it is a defining feature of the order a judge is permitted to enter. Unsurprisingly, the government cites no case from any court that stands for the proposition that a wiretap order can be silent on the fundamental question of where interception may occur.

In any event, this case does not present, and the Court need not reach, the question whether a (presumably rare) order that omits any jurisdictional provision can be justified on the theory that the statutory jurisdictional limitation is somehow "inherent" and "incorporate[d] by default" in such an order. See U.S. Br. 17, 18. Here, the orders at issue did not merely omit a jurisdictional provision; they went further and contained a provision that affirmatively and concededly *violated* the jurisdictional limitation in Section 2518(3). See U.S. Br. 7. Under those circumstances, the orders were facially defective and thus "insufficient." The question presented, to which we now turn, is whether that type of facial insufficiency requires suppression.

B. Title III Requires The Suppression Of Evidence Obtained Pursuant To A Facially Insufficient Wiretap Order

Section 2518(10)(a)(ii) requires a court to suppress evidence derived from a wiretap order that "is insufficient on its face." As petitioners have explained, the plain text of the statute requires the suppression of evidence obtained from a facially insufficient wiretap order. See Pet. Br. 17-25. Not content with the statute Congress actually wrote, the government invites the Court to engraft an atextual and amorphous "fundamental defect" requirement onto the statute's suppression remedy. See Br. 19-31. The Court should decline that invitation.

1. The Government's 'Fundamental Defect' Test Is Deeply Flawed

a. The government does not dispute that Congress's purpose in enacting Title III was to "prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in [the statute]." *Giordano*, 416 U.S. at 514 (footnote omitted). In the government's view, however, only a "fundamental defect"—that is, a "defect that renders an order so deficient on its face that the government cannot rely on it"—can trigger Title III's suppression remedy for facially insufficient wiretap orders. Br. 19.

That "fundamental defect" requirement appears to be a mutant version of the "core concerns" requirement that the court of appeals applied in the decisions below. Yet it suffers from the same fatal flaw: it finds no support in Title III's text or history. In fact, both the text and history confirm Congress's desire to ensure strict compliance with the limitations on the availability of wiretaps and its corresponding desire to require suppression when-

ever those limitations are transgressed by a facially insufficient wiretap order, even if the communications at issue were lawfully intercepted.

As to the text: Title III's command to suppress evidence derived from a facially insufficient wiretap order admits of no exceptions or qualifications. Title III states that, "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial * * * if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515. And if "the order of authorization or approval under which [the communication] was intercepted is insufficient on its face," 18 U.S.C. 2518(10)(a)(ii), the contents of the communication "shall be treated as having been obtained in violation of this chapter," 18 U.S.C. 2518(10)(a). Title III thus imposes a "mechanical test" that leaves "no room for judicial discretion." *Glover*, 736 F.3d at 513. Under that test, when a facially insufficient wiretap order has been issued, "[s]uppression is the mandatory remedy." *Ibid.*

Where, as here, the statutory text is unambiguous, the inquiry is complete unless the resulting interpretation would be absurd. See, *e.g.*, *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004). But the government does not contend that petitioners' interpretation gives rise to absurdity: at most, the government accuses petitioners of "provid[ing] no practical reason why Congress would have intended an error of the sort at issue here to require suppression." Br. 30. That accusation is unfounded: as petitioners have explained, in light of the widespread concern for privacy, Congress could readily have intended (and in fact did intend) to create incentives for strict compliance with Title III's requirements, including the territorial-jurisdiction limitation. See Pet. Br. 34-36. To the extent the

government takes issue with that policy choice, that is a matter to be addressed not to this Court, but to Congress.

As to the history: the question before Congress when it enacted Title III was not simply what might constitute an acceptable degree of electronic surveillance, but whether electronic surveillance should *ever* be permitted. See Pet. Br. 34-35; Rutherford Inst. Br. 18-20. In the wake of this Court's decisions in *Berger* v. *New York*, 388 U.S. 41 (1967), and *Katz* v. *United States*, 389 U.S. 347 (1967), there was substantial disagreement as to whether law enforcement could lawfully engage in electronic surveillance consistent with the Fourth Amendment. In enacting Title III, Congress recognized that wiretapping is inimical to a free society as an "encroachment[] on a man's right to privacy." S. Rep. No. 1097, 90th Cong., 2d Sess. 170 (1968). Accordingly, Congress prohibited wiretaps subject to certain specific and narrow exceptions, and it provided a muscular suppression remedy for violations of Title III's detailed requirements.

The government contends that "Congress could not have intended to [require suppression for] every possible * * * defect that an order might exhibit." Br. 13. Yet that is pure *ipse dixit*. The government barely acknowledges the legislative history; to the extent it does, it primarily relies on a statement in the Senate report that Congress had no intent to "press the scope of the suppression role beyond present search and seizure law." Br. 33 (quoting S. Rep. No. 1097, *supra*, at 96). But as this Court explained in *Giordano* in rejecting the government's reliance on the very same statement, "it would not extend existing search-and-seizure law for Congress to provide for the suppression of evidence obtained in violation of explicit statutory prohibitions." 416 U.S. at 528-529 (citations omitted). And in the same report, the Senate Judiciary Committee emphasized that Title III's suppression

provision "should serve to guarantee that the standards of [Title III] will sharply curtail the unlawful interception of wire and oral communications." S. Rep. No. 1097, *supra*, at 96.

b. In proposing its "fundamental defect" requirement, the government (like the court of appeals) draws on this Court's decisions in *Chavez* and *Giordano*, which adopted what courts have called the "core concerns" test for determining whether suppression is required under subparagraph (i) for "unlawfully intercepted" communications. The government attempts to argue forward from the holdings of those cases; if unlawful interception under subparagraph (i) does not result in suppression unless the violation was "sufficiently important," the argument goes, it must follow that Congress could not have intended to allow facial insufficiency under subparagraph (ii) to result in automatic suppression "even of evidence that was lawfully intercepted within the issuing court's territorial jurisdiction." Br. 21-22.

That argument simply ignores the fact that the Court limited the suppression remedy in subparagraph (i) precisely in order to *distinguish* it from subparagraphs (ii) and (iii), thus giving each subparagraph independent content. See Pet. Br. 26-28. In both cases, the Court concluded that subparagraphs (ii) and (iii) "must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under [sub]paragraph (i)." *Giordano*, 416 U.S. at 527; see *Chavez*, 416 U.S. at 575. As a result, applying a narrowing construction to subparagraph (ii) as well as to subparagraph (i) "would turn [this] Court's approach on its head, elevating policy over text." *Glover*, 736 F.3d at 513.

In an effort to convince the Court that extending the subparagraph (i) test into subparagraph (ii) would not

render subparagraph (ii) superfluous, the government offers two hypotheticals. But neither of those hypotheticals is reassuring.

The government first argues that, under its "fundamental defect" test, subparagraph (ii) would require suppression if "the order and any accompanying materials entirely failed to identify the individual who approved the application," even if an appropriate official did in fact approve the application. Br. 23. That is a remarkable argument for the government to make, because numerous lower courts have considered that question and concluded—*at the government's urging*—that subparagraph (ii) did not require suppression for that type of facial insufficiency under the "core concerns" test of *Chavez* and *Giordano*. See, *e.g.*, *United States* v. *Gray*, 521 F.3d 514, 526-527 (6th Cir. 2008), cert. denied, 557 U.S. 419 (2009); *United States* v. *Fudge*, 325 F.3d 910, 917-918 (7th Cir. 2003); *United States* v. *Callum*, 410 F.3d 571, 576 (9th Cir.), cert. denied, 546 U.S. 929 (2005); *United States* v. *Radcliff*, 331 F.3d 1153, 1163 (10th Cir.), cert. denied, 540 U.S. 973 (2003).

The government does not cite any of those decisions; instead, it relies on the Eighth Circuit's outlying decision in *United States* v. *Lomeli*, 676 F.3d 734 (2012), which held that subparagraph (ii) did require suppression for the failure to identify the official who approved the application. See Br. 24. But *Lomeli* actually illustrates the fundamental problem that results from importing the "core concerns" test (or some variation thereof) from subparagraph (i) into subparagraph (ii). See *Lomeli*, 676 F.3d at 739 & n.4 (noting that the district court had treated subparagraphs (i) and (ii) as identical and held that suppression was required under both).

The government next argues that, under its "fundamental defect" test, subparagraph (ii) would require suppression where a judge initially prepared a wiretap order limiting the duration of interception but a law clerk then accidentally deleted the limitation. See Br. 24. Later in its brief, however, the government contends that, under its "severance" principle, subparagraph (ii) would not require suppression of any evidence from communications that were lawfully intercepted within the 30-day time limit set out in 18 U.S.C. 2518(5), even if the wiretap order was facially insufficient. See Br. 37. And even if suppression would be required, it is hard to imagine that this far-fetched hypothetical would occur with any frequency in the real world.

In all events, the government cannot seriously dispute that its proposed "fundamental defect" requirement would leave subparagraph (ii) with either no work to do or very little, in contravention of the Court's reasoning in *Chavez* and *Giordano*. And more fundamentally, that requirement has no footing in the text of subparagraph (ii).

c. As if more reason were needed, the Court should reject the government's proposed "fundamental defect" requirement because it is impossibly vague.

Beyond the two hypotheticals discussed above, the government never explains what constitutes a "fundamental defect" under its proposed test. Is a defect automatically "fundamental" where it relates to a requirement set out in Section 2518(4)? If not, how should courts determine which of Title III's requirements are sufficiently important to qualify? Is an egregious violation of a less important requirement equivalent to a less egregious violation of a more important requirement? And how is the severity of a violation to be determined, beyond merely looking at the nature of the requirement being violated?

The government offers no answers to these and many other questions.

In addition, it is unclear whether the government's "fundamental defect" test is even the same as the so-called "core concerns" test that this Court adopted in *Chavez* and *Giordano* for determining whether suppression was required under subparagraph (i). If anything, the government's test appears to set a higher bar for suppression. The "core concerns" test looks to whether the violated statutory requirement "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures," and it is satisfied where the violated provision "was intended to play a central role in the statutory scheme." *Giordano*, 416 U.S. at 527, 528; *Chavez*, 416 U.S. at 575.

The government's "fundamental defect" test, by contrast, would consider both the "nature and *severity* of the statutory violation in relation to the purpose of Title III's suppression remedy," Br. 22 (emphasis added), thus suggesting that less "sever[e]" violations even of Title III's most important provisions could be excused. While the government draws (albeit selectively) on this Court's decisions in *Chavez* and *Giordano*, it does not answer the obvious question of whether its test is the same as the *Chavez* and *Giordano* test—and, if not, how it differs.[1]

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[1] Neither *Chavez* nor *Giordano* uses the phrase "fundamental defect" in articulating the standard for suppression under subparagraph (i). The government appears to have borrowed that phrase from the Eleventh Circuit's decision in *Adams* v. *Lankford*, 788 F.2d 1493 (1986), which held that, because alleged violations of Section 2518(3)'s territorial-jurisdiction limitation "d[id] not implicate Congress' core concerns in passing Title III," the violations *a fortiori* were not "fundamental defects resulting in a complete miscarriage of justice" and thereby not cognizable on a petition for habeas corpus. *Id.* at 1500.

In short, what the government asks this Court to do bears no resemblance to statutory interpretation and close resemblance to statutory drafting. But the latter is a task for Congress. And even Congress would be ill-advised to adopt such an amorphous test—one that would "keep defendants and judges guessing for years to come." *Riley*, 134 S. Ct. at 2493 (quoting *Sykes* v. *United States*, 564 U.S. 1, 34 (2011) (Scalia, J., dissenting)). That is exactly the opposite of the result Congress sought in adopting a bright-line suppression remedy in Title III, which aimed to "delineat[e] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 1097, *supra*, at 66.

2. Even If Title III Imposed A 'Fundamental Defect' Test, Suppression Would Still Be Required Because The Orders At Issue Were Fundamentally Defective

For the preceding reasons, there is no valid basis for departing from the statute's plain text and engrafting a "fundamental defect" requirement onto Section 2518(10)(a)(ii). Because the wiretap orders at issue are facially insufficient, the court of appeals should have held that the evidence derived from those orders should have been suppressed.

Even if Section 2518(10)(a)(ii) could somehow be read to contain a "fundamental defect" requirement, however, that requirement would be satisfied here, because the orders at issue were fundamentally defective by any measure. The territorial-jurisdiction limitation "was intended to play a central role in the statutory scheme," *Giordano*, 416 U.S. at 528, and the government's contrary arguments are meritless.

a. The government primarily contends (Br. 26-27, 30) that Title III's territorial-jurisdiction limitation does not

protect individual privacy. That is incorrect. As petitioners and their amici have explained, the requirement that a judge authorize interception only within the court's territorial jurisdiction restricts the ability of prosecutors to engage in forum shopping when applying for wiretap authorizations. See Pet. Br. 35-36; EFF/NACDL Br. 20-21. Limiting forum shopping, in turn, helps to ensure that "the right of privacy of our citizens will be carefully safeguarded by a scrupulous system of impartial court authorized supervision." S. Rep. No. 1097, *supra*, at 225; *United States* v. *North*, 735 F.3d 212, 219 (5th Cir. 2013) (DeMoss, J., concurring).

Echoing the court of appeals, the government contends that it can still engage in forum shopping even under petitioners' interpretation by using a listening post in a preferred judge's district. See Br. 30 (quoting Pet. App. 24a). But even if the government now has the technological capability to locate a listening post wherever it wishes, see U.S. Br. 6 n.2, practical considerations are likely to prevent it from doing so. As amici have explained, Title III is most efficiently executed when the individuals monitoring the surveilled communications are in close proximity to the prosecutors and law-enforcement officials leading the investigation. See EFF/NACDL Br. 19-20. And the government does not dispute that, under its interpretation, there would be no effective restraint on forum shopping, because there would seemingly be no consequence for a violation of the territorial-jurisdiction limitation.

In addition, the government's efforts to downplay the importance of the territorial-jurisdiction limitation are at odds with its insistence that the limitation need not be expressly stated because it is somehow "inherent" and "incorporate[d] by default" in any wiretap order. See Br. 17, 18. If the requirement that a judge authorize interception

only within the court's territorial jurisdiction is so essential that it must be read into every wiretap order, it surely follows that the territorial-jurisdiction limitation is fundamental to Title III's statutory scheme. And an order that not only fails to include that limitation, but concededly violates it, is "fundamentally defective" under any meaningful understanding of the phrase.

b. Perhaps acknowledging the difficulty with the argument that violations of the territorial-jurisdiction limitation do not constitute "fundamental defects," the government contends (Br. 28-30), seemingly in the alternative, that *these* violations do not rise to that level on the ground that the erroneous provision in the orders at issue resulted from an honest mistake. Indeed, the government suffuses its brief with atmospheric references to the issuing court's "mistake[n]" understanding of the exception to the territorial-jurisdiction requirement for "mobile interception devices." See, *e.g.*, Br. 12, 13, 14, 16, 19, 22, 24, 25, 26, 28, 39, 40.

But there does not appear to be any support in the record for the proposition that the issuing court was actually operating on a mistaken understanding—or indeed any understanding—of the territorial-jurisdiction requirement when it issued the orders in question. To the contrary, as the government acknowledges, the issuing court rubber-stamped the "same language" that "appeared in the government's applications for the orders." Br. 7 n.3. And the government's applications do not appear to have flagged any issue concerning the interpretation of the territorial-jurisdiction requirement, but instead merely requested the authority to conduct interception anywhere in the United States if the targeted mobile telephones were transported outside Kansas. See, *e.g.*, 15-3236 C.A. Supp. Rec. vol. 4, at 57, 67. Although Section 2518(3) requires a

judge's specific authorization for the use of a "mobile interception device," neither the government's applications nor the orders themselves say anything about the use of such devices.[2]

Perhaps for that reason, while the government contends that Title III's suppression remedy incorporates an (again atextual) good-faith exception, see Br. 30, it has not argued that any good-faith exception would apply in this case and in fact waives that argument before this Court. See Br. 35 n.6; cf. *Lomeli*, 676 F.3d at 743 (holding that any good-faith exception would be inapplicable where "the applicant failed to comply with the edicts of the federal wiretap statute in procuring the order"). *A fortiori*, the government cannot contend that any mistake by the issuing court—seemingly induced by the government itself—means the resulting violations in this case are not "fundamental."

c. In support of its argument that suppression is unnecessary where an issuing court (or the government) makes a mistake on a question of statutory interpretation, the government relies on this Court's decision in *United States* v. *Ojeda Rios*, 495 U.S. 257, 259 (1990). See Br. 28. But *Ojeda Rios* is plainly distinguishable because it involved a discrete provision of Title III, Section 2518(8)(a), which provides for the sealing of wiretapped communications and contains a specific remedy for the violation of its requirements. Under that provision, suppression is not

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[2] The Assistant United States Attorney who applied for the wiretap orders has repeatedly been cited for her prosecutorial misconduct in criminal cases; she was recently found to have engaged in witness intimidation in one case, and was accused of suppression of exculpatory evidence and failure to disclose a romantic relationship with the judge in another. See, *e.g.*, Dan Margolies & Mike McGraw, *Federal Prosecutors in Kansas City, Kansas, Under Fire for Power Plays in Pursuit of 'Justice,'* KCUR, Nov. 5, 2017 <tinyurl.com/kansasusao>.

required if the government provides a "satisfactory explanation" for any violation. 18 U.S.C. 2518(8)(a).

To the extent the Court in *Ojeda Rios* analyzed whether the government had acted in an "objectively reasonable" manner, it was simply interpreting the "satisfactory explanation" requirement of Section 2518(8)(a), not recognizing some principle governing suppression under Title III more generally. 495 U.S. at 265-266. Indeed, the Court made clear that the general suppression remedy in Section 2518(10)(a) was "not applicable" in that case. *Id.* at 260 n.1. If anything, Congress's considered decision to create what is effectively an exception from suppression in Section 2518(8)(a), while refraining from doing so in Section 2518(10)(a), underscores its intent that the latter provision be strictly enforced. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Of course, in light of the plain text of Section 2518 (10)(a)(ii), the Court need not consider whether violations of the territorial-jurisdiction limitation more generally, or the particular violations at issue in this case, constitute "fundamental defects" that warrant suppression. Where, as here, a wiretap order violates that limitation, suppression of the evidence derived from the order is required. The Court should reject the government's creative efforts to sustain the court of appeals' contrary conclusion.

3. Section 2518(10)(a)(ii) Does Not Contain An Implicit 'Severance' Principle

As a last-ditch attempt to avoid suppression, the government contends that, even if the wiretap orders are facially insufficient, only the evidence that resulted from an invalid "application" of the insufficient orders should be suppressed. See Br. 31. According to the government, because the evidence introduced at trial in this case was

derived from communications that were "lawfully intercepted," this Court can simply disregard the fact that the evidence was obtained under wiretap orders that were "insufficient on [their] face." Br. 14. That is perhaps the government's most ambitious argument, and it should be rejected for multiple reasons.

a. As a preliminary matter, the government did not raise its "severance" argument in the district court or in the court of appeals, nor did it raise it in its brief in opposition to certiorari. Like the government's "overbreadth" argument, therefore, that argument is not properly before this Court. See p. 4, *supra*. Nor is the "severance" argument fairly included in the question presented in the petition for certiorari, on which the Court granted review. See S. Ct. R. 14.1(a). Tellingly, in its merits brief, the government revises the question presented from its brief in opposition (which itself revised the question from the petition) so as to smuggle in the "severance" argument. Compare U.S. Br. i with U.S. Br. in Opp. i. And as with the government's "overbreadth" argument, petitioners have been unable to locate any other case in which the government has advanced its equally novel "severance" argument.

b. In any event, the government's argument lacks merit. The plain language of Section 2518(10)(a)(ii) requires the suppression of any evidence derived from an "order" that is "insufficient on its face." If an order is facially insufficient, all of the evidence obtained under that order must be suppressed; subparagraph (ii), unlike subparagraph (i), does not contemplate an additional inquiry into whether a particular communication was unlawfully intercepted, or whether a different or narrower order could have been facially sufficient. Because the statutory language provides a clear answer, the analysis should

begin and end there. See, *e.g.*, *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999).

The government's linguistic contortions demonstrate the near-absurdity of its argument. According to the government, even if orders are "insufficient on their face" "in some applications," they may not be "insufficient on their face" "in all of them." Br. 31. But the structure of Section 2518(10)(a) makes clear that whether an order is insufficient on its face has nothing to do with how it is "applied"; an order is either sufficient on its face or it is not, and whether a particular "application" of an order is unlawful is the province of subparagraph (i), not subparagraph (ii).

The government's argument amounts to an attempt to read subparagraph (ii) out of the statute by collapsing it into subparagraph (i). Indeed, the government makes little effort to disguise its intent, contending that "suppression is unwarranted [here] because all of the evidence at trial was lawfully intercepted." Br. 14. That may be one way to balance the competing interests of law enforcement and the public, but it is decidedly not the balance that Congress struck. Title III necessarily contemplates suppression in some circumstances in which a communication was lawfully intercepted.

c. In support of its "severance" argument, the government invokes a variety of Fourth Amendment doctrines that limit the scope of the exclusionary rule. See Br. 33-37. As a preliminary matter, while lower courts have recognized a Fourth Amendment doctrine under which the valid portions of a search warrant may be severed from the invalid portions, see U.S. Br. 34 (citing cases), this Court has never recognized, much less applied, that doctrine.

More broadly, the doctrines cited by the government doctrine are inapplicable in the context of Title III. Those doctrines limit the operation of the Fourth Amendment

exclusionary rule. As the Court is well aware, however, that rule is a judicially created remedy for Fourth Amendment violations, under which the suppression of evidence is "[a] last resort, not [a] first impulse." *Utah* v. *Strieff*, 136 S. Ct. 2056, 2061 (2016) (citation omitted). Given that premise, the Court has appropriately recognized a variety of exceptions to the exclusionary rule, see *ibid.*, and lower courts have recognized still others.

Under Section 2518(10)(a), by contrast, "[t]he issue [of suppression] does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III." *Giordano*, 416 U.S. at 524. Unlike the judge-made exclusionary rule, the courts are "limited to interpreting rather than modifying" the provisions of Title III. *United States* v. *Vest*, 813 F.2d 477, 481 (1st Cir. 1987). And under Section 2518(10)(a), suppression is anything but a "last resort"; where the requirements of any of its subparagraphs are satisfied, suppression is an "automatic" and "mechanical" remedy. *Glover*, 736 F.3d at 513, 516.

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Writing for the Court in *Olmstead* v. *United States*, 277 U.S. 438 (1928), Chief Justice Taft presciently recognized that, beyond the protections of the Fourth Amendment, "Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation." *Id.* at 465. In enacting Title III, Congress did just that. While Congress gave law enforcement a powerful investigative tool it did not previously possess, it simultaneously required it to comply with an intricate series of rules, the violation of which would lead to the suppression of the resulting evidence.

In particular, Congress provided in unambiguous language that, if a Title III order were facially insufficient, all of the evidence derived from the order should be suppressed, even if the communications at issue were lawfully intercepted. As a common thread in all of its arguments, the government takes issue with Congress's choice to include facial insufficiency as an independent ground for suppression in Title III (and to include an enforceable restriction on an issuing court's jurisdiction). But the government can and should address that concern to Congress in the first instance. It may not ask this Court to usurp the role of Congress and rewrite the statute by engrafting judicially created limitations onto it.

In sum, the government cannot escape two simple propositions. Title III requires a court to suppress all evidence derived from a facially insufficient wiretap order. And the orders at issue here were facially insufficient because they concededly violated Title III's territorial-jurisdiction limitation. Under those circumstances, suppression is required. The judgments of the court of appeals should therefore be reversed.

Respectfully submitted.

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